Nos. 14483-84

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE C. WICKS,

Plaintiff and Appellants,

vs.

SOUTHERN PACIFIC CO. (Pacific Lines),

Defendant and Appellee,

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,

Intervenor and Appellee.

PHILIP F. JENSEN,

Plaintiff and Appellant,

vs.

UNION PACIFIC RAILROAD CO., a corporation,

Defendant and Appellee,

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES,

Intervenor and Appellee.

On Appeal From Order Denying Preliminary Injunction and Order Granting Summary Judgment and Dismissal.

BRIEF FOR APPELLANTS.

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Intervenor and Appellee.

On Appeal From Order Denying Preliminary Injunction and Order Granting Summary Judgment and Dismissal.

BRIEF FOR APPELLANTS.

Jurisdiction.

This Court has jurisdiction of this appeal by virtue of the authority of Section 1292, Title 28 U. S. C. A., which authorizes appeals from interlocutory orders of the district courts of the United States granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions.

The constitutionality of the Railway Labor Act, Title 45, U. S. C. A. Section 151, *et seq.,* and, in particular,

Section 152 Eleventh thereof is involved. Section 15 Eleventh, Title 45, U. S. C. A. provides, in material part that any carrier and a labor organization are permitte to make agreements, requiring as a condition of continue employment that within sixty days following the beginnin of such employment, or the effective date of such agree ments, whichever is the later, all employees shall becom members of the labor organization representing thei craft or class under certain conditions as set forth in th said section.

The complaint alleges that jurisdiction is based upo diversity of citizenship, a controversy involving mor than $3,000.00, and the determination of a federal ques tion, namely, the constitutionality of certain provision of the Railway Labor Act, and, in particular, Sectio 152 Eleventh, Title 45, U. S. C. A., the constitutionality o the collective bargaining agreement and arbitration pro ceedings and award made pursuant to, and under th authority of, the said statute [T. R. pp. 63-64]. Th complaint alleges that the defendant carrier is a Utal corporation doing business within the Southern Distric of California, Central Division [T. R. p. 55]. (In th companion case, Southern Pacific Co. is alleged to be Delaware Corporation [T. R. p. 105].)

Statement of the Case.

This is a suit in equity to enjoin the defendant rail roads from carrying into effect a provision of a union sho contract with the defendant unions which would requir Appellants to become members of the defendant union as a condition of employment with the defendant carriers

The complaint alleges that, under the Railway Labo Act prior to January 10, 1951, it was illegal for any car

rier to interfere with the organization of its employees or to coerce its employees to join, or not to join, a labor organization, and, further, that such a prohibition on the carrier was made a part of the contract of employment between the carrier and each employee; that on January 10, 1951, the Railway Labor Act was amended by the addition of Section 152 Eleventh, Title 45, U. S. C. A., which provides that any carrier and a labor organization are permitted to make agreements, requiring as a condition of continued employment that within sixty days following the beginning of such employment or the effective date of such agreement, whichever is later, all employees shall become members of the labor organization representing their craft or class under the conditions set forth in the said section; that on the 7th day of March, 1953, the defendant railroad and the defendant union entered into a collective bargaining agreement requiring union membership within sixty days as a condition of employment; that Appellant did not, within sixty days after the effective date of the said agreement, become a member of the defendant union nor did Appellant agree to pay initiation fees, dues or assessments to the said union; that arbitration proceedings were had wherein it was ruled that, since Appellant had not complied with the terms of the union shop agreement, his seniority and employment should be terminated within ten days of the date of the decision. By notice dated February 2, 1954, defendant railroad notified Appellant that effective February 5, 1954, Appellant's services with defendant railroad would be terminated because of the failure of Appellant to become a member of the defendant union; that Appellant is a member of a religious group known as the Plymouth Brethern, and Appellant's belief in the infallacy of the Scriptures

as the inspired Word of God precludes Appellant fro becoming a member of or paying dues, fees or assess ments into any union; that Appellant has offered to cor tribute to any nationally recognized charity a sum whic is equivalent to the dues, initiation fees and assessment otherwise required of the members of the defendar union; that Appellant has acquired numerous benefit from thirty-seven years of seniority, including pensio rights, free transportation over any railroad in the Unite States, Canada or Mexico and hospital and medical bene fits for the rest of his life, all upon retirement at ag sixty-five in the employ of defendant railroad; that Ap pellant is now fifty-seven years of age; that the propose discharge will deprive Appellant of his wages, seniorit rights and benefits and his right and ability to earn livelihood in the work in which he has been trained; tha a discharge is based on the authority of Section 15 Eleventh, Title 45, U. S. C. A.; that said section is un constitutional and void; that judgment be given Appellan declaring the provisions of the Railway Labor Act, th collective bargaining agreement and the arbitration pro ceedings and award unconstitutional and void, insofar a they are applied to Appellant and for a permanent in junction restraining and enjoining the defendant railroa from terminating the employment and seniority of Appel lant for failure to become and remain a member of, or pa initiation fees, dues and assessments to, any labor organi zation.

Defendant union was permitted to intervene and, o motion of the intervening defendant union, Appellant' application for injunctive relief was denied, the temporar restraining order was vacated, and motion for summar judgment was granted and the cause dismissed.

Statement of Questions Presented.

Did the District Court err in holding and concluding that Section 152 Eleventh, Title 45, U. S. C. A. was duly enacted by the Congress of the United States in the exercise of its powers to regulate commerce among the several states?

Did the District Court err in holding and concluding that the claim of Appellants that enforcement of the union shop agreement of March 7, 1953, between defendant union and defendant railroad violates constitutionally protected rights of Appellants is without merit and must be denied?

Did the District Court err in holding and concluding that the Second Amended Complaint fails to state a claim upon which relief can be granted?

Did the District Court err in holding and concluding that Section 152 Eleventh, Title 45, U. S. C. A. violates no constitutional rights of Appellants and, as a part of the supreme law of the land, it is valid and effective to authorize and permit the making of the said union shop agreement of March 7, 1953, which agreements are valid, subsistent agreements between the defendant railroad and the defendant union and must be given effect according to their terms.

I.

The Union Shop Statute Deprives Appellants of Thei Right to Work and Freedom of Association Cor trary to the Guarantee of the Fifth Amendmen That No Person Shall Be Deprived of Liberty o Property Without Due Process of Law.

A. The Right to Work.

The due process clause of the Constitution protects a individual's right to work against federal or state legis lation. The Supreme Court has made it clear that Cor gress, in seeking to regulate interstate commerce, unde the Railway Labor Act, must, in exercising such powe conform to the requirements of due process imposed b the Fifth Amendment.

> *Virginia Railway Co. v. System Federation No. 4* 300 U. S. 515.

In several cases the Supreme Court has stated that th right to work is protected by the due process provision of the Federal Constitution. In *Yick Woo v. Hopkin* 118 U. S. 356, the Supreme Court said:

> "The very idea that one may be compelled to hol his life, or the means of living, or any material righ essential to the enjoyment of life, at the mere wi of another, seems to be intolerable in any countr where freedom prevails, as being the essence o slavery itself."

In *Allgeyer v. Louisiana,* 165 U. S. 578, 589, it is said

> "Liberty means not only the right of the citize to be free from the mere physical restraint of hi person, by incarceration, but the term is deemed t embrace the right of the citizen to be free in th enjoyment of all his faculties; to be free to use the

in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation . . ."

In *Truax v. Raich,* 239 U. S. 33, 41, the statement is made that:

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the amendment to secure."

Accord,

Meyer v. Nebraska, 262 U. S. 390;

Pierce v. System of Sisters, 268 U. S. 510;

Takahashi v. Fish & Game Commission, 334 U. S. 410.

This constitutional right to engage in one of the common occupations of life cannot be made subject to unreasonable or arbitrary conditions. In *Smith v. Texas,* 233 U. S. 630, Smith was convicted for violation of a Texas statute making it a crime to act as a railway conductor without having first served for two years as a freight conductor or brakeman. It was conceded that Smith, through his experience in other positions, was competent to fill the position. The Supreme Court held that the statute was unconstitutional saying at page 636:

> "Insofar as man is deprived of the right to labor, his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and *the constitutional guarantee is*

an assurance that the citizen shall be protected in the right to use his power of mind and body in any lawful calling." (Emphasis added.)

Union membership is just as unreasonable and arbitrary a condition of railroad employment as the qualification struck down in *Smith v. Texas.*

The right to work is a constitutional right and as such is entitled to the full protection of the due process clause of the Federal Constitution. Individuals may make private contracts and in them waive their constitutional rights, if they wish, but these same rights cannot be taken away from them by the state or federal government.

Due process requirements are met where employees are given the privilege of organizing and bargaining through their representative, provided non-union employees are not in that process deprived of the same freedom which gives rise to the rights of the majority. The freedom to join and that of not joining are correlative. It is unrealistic to claim that individual employees are free to quit their jobs if they do not wish to join the union. It is generally recognized that employees do not have the theoretical freedom to quit, especially where they are responsible for the support of a family. The end result in most cases is that the employees are deprived of religious freedom by the economic necessity of joining the union in order to keep their jobs.

B. The Right to Freedom of Association.

Appellants' freedom of association is threatened by the compulsory unionism sought to be enforced upon them under the union shop amendment. This is the factor which is critical to Appellants by virtue of their religious teach-

ings and doctrines, which hold that members of the Plymouth Brethern may not be associated in any group where there are unbelievers.

It is a fundamental right of men to organize and bargain collectively with their employer, a right which exists separate and apart from legislation. *N. L. R. B. v. Jones & Laughlin Steel Corporation,* 301 U. S. 1; *Auto Workers v. Wisconsin Board,* 336 U. S. 245. The instant case involves the converse of this right, that is, the right not to associate. All freedoms rest on choice. *If men are free to join unions, they must also be free not to join; otherwise, they have no freedom of association.*

C. Property Rights of Appellants Have Been Infringed.

Many seniority rights acquired by Appellants which are protected by the Fifth Amendment have been infringed by the union shop statute. Appellants' wages are property and, to the extent that they are forced to pay initial fees, dues and assessments to the union, they are deprived of their property. Further than this, the wages, medical benefits, pension rights, and free transportation for life are rights of property founded on contract and protected by the Fifth Amendment.

Nord v. Griffin, 86 F. 2d 481;

Primakow v. Railway Express Agency, 56 Fed. Supp. 413;

Piercy v. Louisville Railroad Co., 198 Ky. 477;

Stephenson v. New Orleans, etc. Co., 180 Miss. 147;

DeMille v. American Federation of Radio Artists, 31 Cal. 2d 139.

II.

The Union Shop Statute, Insofar as It Requires Involuntary Money Payments, Is a Deprivation of Appellants' Property Without Due Process of Law in That It Is an Exercise of the Taxing Power in Favor of Private Organizations.

Congress can require money payments only through exercise of the power of tax. This power to tax is limited by the requirement that taxes be collected only for a public purpose.

United States v. Butler, 297 U. S. 1;
Loan Association v. Topeka, 20 Wall.

Congress cannot, under the guise of a tax, accomplish that which is otherwise forbidden. *United States v. Constantine,* 296 U. S. 287. It follows that Congress cannot disguise an unlawful tax by purporting to enact it pursuant to a constitutional power other than that empowering it to levy taxes.

Insofar as the union shop statute requires that employees pay initiation fees, dues and assessments to a union, it is a requirement of money payments and unmistakably an imposition of a tax. It is a tax for the benefit of a private organization and must be held an invalid exercise of the taxing power.

III.

Appellants Are Denied Freedom of Assembly, Petition and Speech Protected by the First Amendment.

The freedoms secured by the First Amendment are entitled to a "preferred" constitutional position. *Thomas v. Collins,* 323 U. S. 516. Congress may not, in the guise of labor legislation, pursuant to its power of interstate commerce, abridge the freedoms guaranteed by the First Amendment.

> *Jacksonville Paper Co. v. N. L. R. B.,* 137 F. 2d 148, 152;
>
> *N. L. R. B. v. Virginia E. & P. Co.,* 314 U. S. 469, 477.

The freedom of assembly or freedom of association encompasses the right to join any private organization, including a labor union. *Thomas v. Collins, supra,* 323 U. S. 516. At page 532 the court said:

> "The right thus to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as a part of free speech, but as a part of free assembly."

The freedom of assembly, of course, includes the freedom not to assemble, just as freedom of speech necessarily carries with it a freedom to be silent.

> *Board of Education v. Barnette,* 319 U. S. 624, 633.

When a man is compelled to become a union member because his only alternative is to give up his means of

earning his livelihood, he can hardly be said to have joined of his own free will. Further than that, if he is required to make financial contributions to its support and maintenance, his freedom of assembly is completely destroyed.

The right to petition is also invaded. When one becomes a member of a union, he becomes associated with an organization which engages in a variety of political activity, advocating specific legislation and supporting particular candidates for office. Where membership and support are involuntary, freedom of petition is abridged because the individual is required to authorize a union to petition in his name regardless of his personal desires in the matter. Of course, the individual could quit his job to protect his right to petition for himself, but the Constitution does not require this in order to exercise a fundamental freedom.

The rights granted under the First Amendment are not absolute, but before they can be abridged, there must be a "clear and present danger" to justify infringement of these rights.

Board of Education v. Barnette, supra, at 639

United States v. Dennis, 183 F. 2d 201, 212.

IV.

The Union Shop Statute Violates the Proscription Against Involuntary Servitude of the Thirteenth Amendment.

The requirement that in order to hold his job, a man must become a union member and thereafter pay to the union such amounts as are levied in the sum of fees, dues or assessments, is involuntary servitude. The Thirteenth Amendment is directed against forced labor. It was intended to prevent a man from being compelled to work for another against his will.

Pollock v. Williams, 322 U. S. 418;
Taylor v. Georgia, 315 U. S. 25;
Bailey v. Alabama, 219 U. S. 219, 245.

A man's wages represent his physical efforts. When a man is required to make involuntary money payments to a union, he is to the extent of these payments required to deliver the fruits of his labor. For practical purposes, the labor necessary to produce the fruits for delivery to a union is being performed for the union itself, so that compulsory union membership and payment of initial fees, dues and assessments requires labor for the union. Compulsory unionism does not result in involuntary servitude to the railroad, but is involuntary servitude *to the union.* To argue that a man is always free to terminate his employment and go elsewhere, and hence there is nothing involuntary involved, is specious. The mere existence of alternatives does not mean that an unwilling selection of one course of action is not involuntary in a legal sense. When a man joins a union only because the alternative is to surrender a substantial wage, seniority and retirement benefits, his "choice" of union membership can hardly be anything but involuntary.

V.

The Union Shop Statute Was Not Enacted Pursuan to the Constitutional Power to Regulate Inter state Commerce.

In *Virginia Railway Co. v. System Federation No. 4(supra,* 300 U. S. 515, it is said:

> "The power of Congress over interstate commerc extends to such regulation of the relations of ra carriers and their employees as are reasonably ca culated to prevent the interruption of interstate com merce by strikes and their attendant disorders."

There is nothing in the title of the Act, nothing in th Act itself, that indicates that it was supposed to hav any effect on interstate commerce whatsoever. The Re ports of the Committee of the House and Senate do nc indicate that the Amendment has any relation to inter state commerce. The Reports do not show that th Amendment is reasonably calculated to prevent the inter ruption of interstate commerce. The Reports do nc say that state laws which the Amendment purports to se aside directly burden or obstruct interstate commerc In short, there is nothing in the Amendment to connec the statute with the commerce power of Congress. A the Supreme Court said in *Adair v. United States,* 20 U. S. 161:

> "'* * * [W]hat possible legal or logical connec tion is there between an employee's membership i a labor organization and the carrying on of interstat commerce? Such relation to a labor organizatic cannot have, *in itself* and in the eye of the law, ar bearing upon the commerce with which the employe is connected by his labor and services. * * * H

> fitness for the position in which he labors and his diligence in the discharge of his duties cannot in law or sound reason depend in any degree upon his being or not being a member of a labor organization. It cannot be assumed that his fitness is assured, or his diligence increased, by such membership, or that he is less fit or less diligent because of his not being a member of such an organization. It is the employee as a man and not as a member of a labor organization who labors in the service of an interstate carrier.' (208 U. S. at 178-179.)"

This legislation authorizing union membership is of the type of legislation held in *Railroad Retirement Board v. Alton Railroad Co.,* 295 U. S. 330, not to be a valid exercise of interstate commerce. In the *Railroad Retirement* case, *supra,* the court held that pensions were related solely to the social welfare of the worker and were too remote from being a regulation of commerce; so, in this case, the imposition of union membership is related solely to the social welfare of the labor unions and is too remote from being a regulation of commerce. The legislation is simply designed to strengthen particular claims of employees in their bargaining relationship with the employer.

It can hardly be argued that if union membership is not required as a condition of employment, the lack of compulsory union membership will interrupt, if not destroy, interstate commerce. The lack of compulsory unionism during the past twenty years has not contributed in any respect to the interruption of interstate commerce, where compulsory unionism has been prohibited by federal law.

VI.

The Union Shop Statute Unconstitutionally Deprive Appellants of Freedom of Religion Secured by th First Amendment.

We submit that the case of *West Virginia State Boar v. Barnette,* 319 U. S. 624, is decisive of this case i favor of Appellants. In the *Barnette* case, *supra,* th State of West Virginia passed a law requiring pupi in public schools to salute the flag of the United State while reciting a pledge of allegiance under penalty c expulsion. Children of Jehovah's Witnesses' faith wer expelled from school because they refused to salute th flag and recite a pledge of allegiance because to do s violates their religious beliefs. The Supreme Court hel that the State statute requiring the salute to the flag an the recitation of the pledge of allegiance was unconstitu tional as invading the right to freedom of religion an freedom of opinion in violation of the First and Fou teenth Amendments to the Constitution.

In the course of the opinion in the *Barnette* case, th Supreme Court gives several reasons why the statute unconstitutional as applied to persons with religious prin ciples. All of the points have striking similarity to th facts of this proceeding. The first point that the Cou made was that the freedom asserted by the members c Jehovah's Witnesses did not collide with rights asserte by any other individual. That is true in the instant pro ceedings. The freedom asserted by the employees i this case does not collide with the rights asserted by an other individual. Any person is free to join the unio if he so desires. These employees ask only that the right of freedom of religion not be interfered with. Th Court noted that the behavior of the Jehovah's Witness

as peaceful and orderly. This is true in this case. econd, the Court in the *Barnette* case observed that the ction required was not optional, it was compulsory just s in the instant proceedings. The Court emphasized the ement of coercion involved. Third, the Court stated at the action requires the individual to publicly accept olitical ideas contrary to his beliefs where such acceptance coerced. Likewise, in this case the action of compell-g these employees to join the union is to coerce them to publicly accepting political ideas contrary to their eliefs where such acceptance is coerced. Fourth, and as n offshoot of the third point, the Court noted that the tatute required affirmation of a belief and attitude of ind. In this proceeding the employees are required to ublicly accept something that they do not believe in. ifth, the Supreme Court noted in the *Barnette* case that he statute suppressed expression of opinion where there as no clear and present danger existing. The Court ob-erved that freedom of opinion and religion cannot be mpaired by a sovereign unless a clear and present danger o society exists. Certainly there is no clear and present anger existing in this case which necessitates an in-ividual to join a particular union and thereby com-romise his religious convictions. Sixth, the Supreme ourt stated that the purpose of the Bill of Rights was o protect minorities from majorities and that one's right o freedom of religion may not be submitted to a vote f a majority. In sum, this means that a majority in ongress cannot interfere with these employees' right to reedom of religion. Finally, the Supreme Court observed hat the sovereign cannot restrict freedom of religion xcept where grave interests of society must be protected. Ve adopt the language of the Supreme Court quoted ereafter as being particularly pertinent to this proceeding:

"If there are any circumstances which permit exception they do not now occur to us."

The trial court was clearly in error in stating that, a suming the presence of the hand of government, still t First Amendment's guarantee of freedom of religion pı tects only against "prohibitions." This conflicts wi countless decisions which show that individual consti tional freedoms are protected not only against *prohibitic* but also against the imposition of unreasonable and ar trary conditions on their exercise. Two cases, of mar in point are *Murdock v. Pennsylvania,* 319 U. S. 105 a *Follett v. Town of McCormick,* 321 U. S. 573. In ea of these, the Supreme Court struck down, as an uncc stitutional invasion of freedom of religion, a local t imposed on Jehovah's Witnesses, for distribution of lite ture on the streets. There was no *prohibition* involv in these cases. Murdock and Follett were free to pay t tax in question and distribute literature as they wish The trial court in this instant case stated that no showi had been made that appellants were being discriminat against. There is no need to prove *discrimination* to prc a case of unconstitutional invasion of freedom of religi In the *Barnette* case, *supra,* where the Supreme Court h unconstitutional enforcement of the rule requiring public school children to salute the flag, there was no d crimination in the sense referred to by the trial cou There was simply a showing of unreasonable and arbitra consequences imposed as a result of adherence to religic tenents, and so there is in the instant case. Appella are threatened with discharge from employment beca their religious beliefs will not allow them to join and le support in any way to an organization, including a lal organization, whose members do not share their fai That is all that the law requires to be shown.

VII.

The Requirement of Compulsory Union Membership Pursuant to the Union Shop Statute Involves "Government Action" so as to Require Decision of the Constitutional Questions Raised.

The first ten amendments to the Constitution are a check only on the activity of Congress and are not limitations on purely private action. (*Corrigan v. Buckley,* 271 U. S. 323, 330.) This requirement does not extend to the Thirteenth Amendment's proscription of involuntary servitude, which, by definition, applies to government and private action alike.

The decision of the constitutional question raised in this case does not require a showing that the object of complaint is *solely* the action of government. The condition is satisfied by showing that private parties have been aided "in some way" by "government's thumb on the scales." (*American Communications Association v. Douds,* 339 U. S. 382, 401-402; *Civil Rights Cases,* 109 U. S. 3, 11, 17.) The points to be made in this connection are:

1. Affirmative intervention by Congress through the Railway Labor Act was and is absolutely necessary to insure against frustration of its intention of saving national uniformity for the railroads in the union shop matter.

2. The statutory position of the unions under the Railway Labor Act is such that their activities in relation to the union shop have been and are, in legal effect, actions of the federal government.

3. The union shop amendment must be considered an express decision by Congress that the union shop should prevail in the railroad industry since Con-

gress knew that the effect of the amendment woul be that compulsory unionism would be imposed o the railroads of the United States, and Congres must have intended the consequences of its acts.

When Congress enacted the union shop amendment o 1951 to the Railway Labor Act, it did much more tha merely remove a preexisting proscription against bargain ing for a union shop. There was in existence in severa states statutes expressly outlawing compulsory unionisr by "right to work" laws. These state "right-to-work" statutes would have precluded the unions in the railroa industry from demanding that the railroads sign a system wide union shop agreement. If the Railway Labor Ac said nothing about the union shop, these state laws woul unquestionably be applicable. To take precedence ove state law affirmative congressional action in favor of th unions was necessary. It was necessary to carry ou the intent of congress to put the unions in a positio to bargain for union shop agreements valid in all of th forty-eight states. By express terms, the 1951 amend ment purports to take precedence over all state laws t the contrary. The purpose of Congress to supersede stat law applied not only to "right to work" laws in existenc at the time of its amendment, but also to those whic might subsequently be enacted. Thus, the effect wa actually felt in all states. In those having "right to work laws, the laws were swept aside with respect to railroa employees. In other states, the legislators were told tha they could not pass "right to work" laws applicable t railroad employees. It is not within the power of privat parties to modify state laws; only an act of Congres can do so. It cannot be denied that such far-flung exe

ion of sovereign power constitutes "government action" y Congress.

Consideration of the statutory position of the modern abor union has led a number of courts to consider the ole which Congress has given them when constitutional ssues have been raised. It is settled law that where a abor union, organized and functioning pursuant to au- hority of statute, performs certain acts which the statute irects or permits, what it does partakes, in legal effect, f the nature of governmental action. In *American Com- unications Ass'n v. Douds,* 339 U. S. 382, 401-402 1950), the Supreme Court said of actions of a labor nion certified under the National Labor Relations Act s an exclusive bargaining agent:

> "Power is never without responsibility. And when authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin in some respects, to its exercise by Government itself."

In *Steele v. Louisville & Nashville Railroad Co.,* 323 J. S. 192 (1944), it was argued to the Supreme Court hat a collective bargaining agreement secured by the Brotherhood of Locomotive Firemen and Enginemen was nconstitutional because it discriminated against Negroes. The Court said:

> "* * * [The labor union] representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which also is under an affirmative constitutional duty equally to protect those rights." (323 U. S. at 198.)

This quotation unmistakably recognizes that when legislative body like Congress vests power and authorit in groups or associations like defendant unions, th actions of the latter are to be judged as tantamount t those of the legislature. So, in this case, Congress swe aside state laws to vest in railroad unions power t demand and get contracts requiring union membershi as a condition of employment. It is, therefore, impossib to conclude that there is no "government action" in th case.

The Supreme Court has several times spoken as t what constitutes "State action" sufficient to raise const tutional questions under the Fourteenth Amendment. W must take it that its words would be equally applicab in determining what constitutes Congressional action s as to require decision of constitutional issues raised und the first ten Amendments. In a leading case, the Court sa that questioned action must be "sanctioned *in some wa* by the State, or * * * done under State authorit in the shape of *laws, customs,* or judicial or *executiv proceedings*" to raise a constitutional issue under th Fourteenth Amendment. (Emphasis supplied.) (*Civi Rights Cases,* 109 U. S. 3, 11, 17 (1883).) These stat ments were expressly reaffirmed very recently in *Shelle v. Kraemer,* 334 U. S. 1, 14 (1948).

Surely, in the case at bar, the union demands for union shop have been "sanctioned in some way" by Co gress. Their demands have clearly been made pursuant Congressional authority in the form of the Union Sho Statute coupled with the other provisions of the Railwa Labor Act which vest in the unions the exclusive bargai ing position they occupy and which command railroa to bargain with them. And, it cannot be controvert

hat the union demands have been sanctioned by "executive roceedings" in the form of the hearings before and eport of Emergency Board No. 98 expressly *recommend-ng* that the nation's railroads sign union shop agree-ients with appellant unions.

In *Steele v. Louisville & Nashville Railroad Co., supra,* he Supreme Court said:

> "If the Railway Labor Act purports to impose on petitioner and the other Negro members of the craft the legal duty to comply with the terms of a contract whereby the representative has discriminatorily restricted their employment for the benefit and advantage of the Brotherhood's own members, *we must decide the constitutional questions, which petitioner raised in his pleading.*" (Emphasis added.) (323 U. S. at 198-199.)

To comply with the unequivocal meaning of the quoted anguage from the *Steele* case, this court must pass upon he constitutional questions raised.

This Court cannot overlook the additional fact that Congress has spelled out the particular type of union shop hat is permissible. It has not permitted the parties to nter into their own form of union shop agreement or a ype of union shop agreement which may be lawful with-n the various states at common law or by statute. Con-equently, it is Congress that is sanctioning the particular ype of union shop agreement involved in this proceeding.

That the unions, shortly after enactment of the Union Shop Statute, would demand and obtain union shop con-racts across the country was pointedly forecast by labor eaders as well as representatives of management. George M. Harrison, union official, appeared before the Sub-

committee of the Committee on Labor and Public Welfar United States Senate, in support of the Amendmer After conceding that there were approximately 280,0(to 350,000 employees on the railroads who were not unic members, the following colloquy ensued:

> "Senator Donnell: They are not in the unions t to this time?
>
> Mr. Harrison: That is right.
>
> Senator Donnell: So, if this bill is passed, som where around, we will say, in round figures, 300,0(—ranging from 280,000 to 350,000—people who thi far have not joined the union will find themselv confronted by a bill whose first purpose is, accordir to your statement, to cause every employee to b come obligated to join the union. That is right, it not?
>
> Mr. Harrison: That is right." (*Hearings befo Subcommittee of the Committee on Labor and Publ Welfare on* S. 3295, 81st Cong., 2d Sess., 2 (1950).)

Jacob Aronson, Vice President and General Counsel the New York Central Railroad Co., stated that:

> "If this bill is enacted into law, it means that evei railroad employee * * * must join the union ar pay dues and continue to be a member in good stan ing in order to hold his job." (*Id.,* 152.)

Paul J. Neff, Chief Executive Officer of the Missou Pacific Railroad, made the practical aspects of the statu plain:

> "I note in this bill the words 'shall be permitted- (a) to make agreements.' The words might just well be written 'railroads shall be required to ma agreements.' Certainly there can be no doubt th

economic pressure would be applied in the usual way if the word 'permitted' is used." (*Id.,* 190.)

R. H. Smith, President of the Norfolk & Western Railway Company said:

"If Senate bill 3295 becomes a law, the labor organizations would undoubtedly present and prosecute on a Nation-wide basis demands for union shop and the check-off, or automatic deduction from employees' pay of union dues, fees, and assessments. Experience in recent years and the known fact that the railroad labor organizations have requested this enabling legislation demonstrate that they would push their demands to the point of finally resorting to their economic strength and the strike weapon to enforce their demands. *Thus, enactment of the bill would be practically equivalent to establishment of the union shop with a check-off system on all railroads.*" (Emphasis supplied.) (*Id.,* at 176.)

Emergency Board No. 98 was created to consider the union demands for union shop contracts in light of the amendment and recommended that the Nation's railroads accede to those demands. Referring to the hearings before committees of Congress which preceded enactment of the Amendment, the Emergency Board itself said:

"* * * [I]t was specifically and emphatically advised by several of the Carrier spokesmen that passage of the amendment would mean enactment of the union shop for the whole industry. And even if these statements were to be discounted as advocacy, *Congress was in no doubt as to the intention of the unions to press vigorously for the union shop on a national basis. Congress cleared the path for such uniform national treatment of the issue by enacting that State laws against compulsory unionism should*

> *not stand in the way of agreements on the railroads*- departing in this respect from the model of the Taf Hartley legislation. But Congress did not stop ther *It provided detailed terms on which union-shop agre ments might be made,* dealing not only with the pro lem of discrimination and arbitrary union acti against members but also, in careful detail, with t problem of dual membership in the operating phas of the industry. And all this Congress did wi thorough knowledge of the facts concerning the cu rent status of the unions on the railroads. * * (Emphasis supplied.) (Report of Emergency Boa No. 98, February 14, 1952, 11-12.)

These quotations demonstrate that Congress knew wh the consequences of the union shop amendment to the Ra way Labor Act would be and what its purpose was. knew that all non-operating employees of the Nation railroads would be faced with the alternative of joinir and paying their money to the union or lose their jot No conclusion can be reached but that Congress intend that result and that its hand is unmistakably involved this case.

Conclusion.

For the reasons set forth herein, it is respectful submitted that the order and judgment denying a pr liminary injunction and granting summary judgment a dismissal of the above entitled cause should be reversed. May, 1955.

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